APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 17,344

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLANT

v.

LOCAL UNION NO. 125, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO, DEFENDENT-APPELLEE

ORDER VACATING JUDGEMENT AND REMANDING WITH INSTRUCTIONS

The Secretary of Labor brought this suit under Section 402 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 482, to challenge the validity of a union general election held in June, 1963, and a runoff election held the following month. The district court, in an opinion reported at 231 F. Supp. 590, dismissed the Secretary's complaint insofar as it dealt with the general election on the ground that internal union procedures had not been exhausted in an effort to correct the alleged irregularities in that election, and the Secretary here contests the propriety of that dismissal.

Subsequent to the decision of the trial judge, a general election was held by the union in June, 1966. The present union officers hold their positions pursuant to this 1966 election and not the election chal-

248-411—67——2

lenged by the Secretary. Appellee contends, and the court agrees, that this fact renders moot the question on appeal, since the statutory remedies for election irregularities can serve no purpose here in light of the subsequent election which has been held. To prevent the district court decision herein held to be unappealable from serving as a precedent, the court will not dismiss the appeal as requested by appellee, but will vacate the judgment of the district court dismissing a portion of the Secretary's suit and will remand with instructions to dismiss the complaint as moot insofar as it relates to the 1963 general election. See *United States* v. *Munsingwear*, 340 U.S. 36 (1950).

The court deems it appropriate to cite here the following observation of the Second Circuit in the cases of *Wirtz v. Local Unions 410, 410 A, 410 B & 410 C, International Union of Operating Engineers* and *Wirtz* v. *Local 30, International Union of Operating Engineers*, decided August 1, 1966:

> As these cases illustrate, it is the delays incident to civil cases in the district courts which create the substantial likelihood that subsequent union elections will moot title IV cases prior to appellate review. To prevent recurrence of such delays, we think the district courts should expedite the trial of title IV cases to the greatest extent possible.

It is ORDERED that the judgment of the district court dismissing the portion of the Secretary's complaint dealing with the 1963 general election is vacated, and the case is remanded with instructions that said portion of the complaint be dismissed as moot.

ENTERED BY ORDER OF THE COURT
CARL W. REUSS, *Clerk*.

APPENDIX B

United States District Court Northern District of Ohio, Eastern Division

Civil Action No. C 64–99

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

LOCAL UNION NO. 125, INTERNATIONAL HOD CARRIERS' BUILDING AND COMMON LABORERS' UNION OF AMERICA, DEFENDANT

DEFENDANT'S MOTION TO DISMISS PART OF THE COMPLAINT

CONNELL, Chief Judge

On February 7, 1964, the Secretary of Labor brought complaint against the defendant union under the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 *et seq.*, 29 U.S.C.A. § 401–530, hereinafter referred to as LMRDA. The plaintiff seeks to void the election of officers in 1963, compel a new election under the aegis of the federal government, and to restrain those presently holding office from disposing of the assets of the union.

From the complaint, the allegations of which we must accept as true for the purposes of this motion, we recognize these uncomplicated facts which have brought this case here. On June 8, 1963, the union held an election; all offices were filled except that of Business Representative, where the vote ended in a tie. Consequently, a runoff election was held on July 13,

1963 for that office alone. After this election, a member in good standing (as yet unnamed) lodged a protest with the union against the conduct of that election. Having received a denial of his protest, he filed a timely complaint with the Secretary of Labor, alleging violations of 29 U.S.C.A. § 401. After investigation and consideration, the Secretary instituted this action which complains not only of irregularities in the conduct of that run-off election, but also attacks the first election.

The defendant now moves to dismiss that portion of the complaint which is directed to the election of June 8, 1963, on the ground that the statute (29 U.S.C.A. § 482(a)[1] permits suit by the Secretary only at the instance of a complaining member who has exhausted his internal avenues of protest. There is no allegation that a member complained internally about the conduct of that June 8 election. The plaintiff resists the motion on three grounds: (1) that the run-off election was such an integral part of the whole

[1] § 482. Enforcement—Filing of complaint; presumption of validity of challenged election

(a) A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or.

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation, may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

election that complaint against it reaches to the entire election; (2) the legitimate inquiry by the Secretary addressed to the election of July 13, 1963, uncovered irregularities which must be corrected in the interest of the public; (3) The exhaustion of remedies is not an absolute requirement, so the Court in its discretion is empowered to disregard the absence of internal attack upon the election of June 8.

We cannot agree with the Secretary that exhaustion of the member's right of protest within the union against the run-off election operates to bring the whole election under the scrutiny of the Secretary and the jurisdiction of this Court. The plaintiff argues strongly that the two polls are but two elements of a single transaction, so that attack by the member upon the balloting on July 13 is really an attack upon the entire election. To support this contention, the plaintiff directs the Court's attention to Webster's New Collegiate Dictionary 761 (1961), which defines "run-off" as a final race, contest, or the like, to decide an earlier one that has ended without a decision in favor of any one competitor." Though this definition, and common sense, establish a strong logical relationship between these two polls, it must be remembered that the complaint is directed against the procedural *conduct* of the election. We cannot assume that on both occasions the identical procedure was utilized by the union. We cannot assume that the irregularity to which the member addressed his complaint about the run-off was present in the initial balloting. Nor can we assume that the member intended to complain about the whole election when he only notified the union that he was dissatisfied with the conduct of the run-off election. Thus the first ground advanced by the Secretary is untenable.

The second and third contentions proffered by the plaintiff are designed to elicit from the Court a favor-

able construction of § 482(a) in light of the permissive language contained in § 411(a)(4) of the statute. Section 411(a)(4) states that a member "may" be required to exhaust internal remedies before seeking enforcement of his rights in an administrative or legal proceeding. It is not wholly insignificant that earlier drafts of this "Bill of Rights" contained in the word "shall" instead of "may". Cf. Legislative History of Labor-Management Reporting and Disclosure Act, P. 698, H.R. 8342, as reported.[2] In other words, the Secretary would have us read the permissive spirit of § 411, which is the heart of the Act into § 482, upon which this action is predicated.

As is often the case when a court is confronted with a new statute, our attention is directed to the situation which provoked the LMRDA and the deliberations of the legislative body which enacted the bill. This Act was the result of agitation for legal control over union leadership in order to preserve democracy within unions and to guarantee every union member the right to make his voice heard in the formulation of union policy. One of the most articulate pleas for such legislation was that of then Professor Archibald Cox. In his article "The Role of Law in Preserving Union Democracy", 72 HARVARD LAW REVIEW 609, he specifically rejected one form of proposed legislation, then pending, which gave the government wide powers to regulate the internal affairs of unions:

> The fundamental objection is that it would have turned over to an arm of the federal government the responsibility of carrying on the internal governmental processes of a labor union without any showing that the union officers and members were incompetent and corrupt. Such a measure does not promote

[2] The next version of the bill, H.R. 8400, substituted "may" for "shall". There is no explanation, however, for the change.

> freedom or democracy. It reduces self-government. It denies the private responsibility and self-determination which lie at the heart of a voluntary association. 72 *Harv. L. Rev.* 609, 630.

Commenting upon the problem which the instant case presents, Professor Cox stated:

> Any member who can show that he has pursued in timely fashion the remedies available to him, within the union and any parent body, should be allowed to file a complaint with the Secretary of Labor alleging that a union election violated the statute. Requiring the exhaustion of internal remedies would preserve a maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections . . . *Ibid.*, at 633.

Thus the commentator who urged most strongly the passage of the LMRDA viewed the exhaustion of internal remedies as an integral part of that bill.[3]

Investigation of the deliberations of Congress further illuminates the viability of the exhaustion doctrine. At no point did the legislators indicate a willingness to abrogate this traditional requirement in favor of summary action by the federal government; on the contrary, we are confronted at every turn with positive, unequivocal expressions of faith in the ability of unions to regulate their own affairs.

> In filing a complaint the member *must* show that he has pursued any remedies available to him within the union and any parent body in a

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[3] For a contrary view concerning internal remedies, see Montemuro, "The Doctrine of Exhaustion of Union Remedies", 2 Duke B. J. 148 (1952). The author's principal objection, however, is directed against dilatory tactics by the union after it has disciplined a member; that is not our problem.

> timely manner. This rule preserves a maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections. *If* the member is denied relief by the union or can obtain no decision from the union any way or another within three months, he may complain to the Secretary. S. Rep. No. 187 on S.B. 1555, p. 21; Legislative History of LMRDA, vol. I, p. 417 (emphasis added).

At least the Committee which drew up the report on the bill seemed to think that exhaustion was a condition precedent to action by the Secretary.

At another point in the report, the Committee again expressed its reticence to shackle labor relations with further encumbering interference by the government.

> The provisions of the bill are not to be interpreted as taking the place of, or excusing non-compliance with established standards of proper conduct or any voluntarily adopted labor or management ethical practices code. Nor are they to be interpreted as precluding further voluntary action . . . The committee is convinced that rigid Government controls should be avoided if it is all possible to do so. It is also convinced that labor and management have considerable ability to regulate their own affairs through their own voluntary action. S. Rep., supra, p. 23; Legislative History, supra, p. 419.

Thus we are forced to agree with the statement of Judge Wilson in *McGraw* v. *United Association of Journeymen and Pipefitting Industry,* 216 F. Supp. 655, 660 (E.D. Tenn., S.D. 1963), that the exhaustion of remedies requirement is based upon a Congressionally approved policy of affording unions the opportunity of correcting their own errors and encour-

aging union responsibility, initiative and self-discipline. In other words, a complaining member must first seek redress from his peers before inviting the Government to champion his cause.[4]

With this background, we address the other two objections of the plaintiff. The second objection, i.e., that the public interest demands correction of abuses uncovered in the June 8 election, is closely related to the first contention. The secretary seems to say that once he has the right to investigate and correct by suit any aspect of any union election, this grants him *carte blanche* authority to reach all aspects of a union's election procedures. But in this, he fails to distinguish between his right to investigate under the Act and his standing to sue under the Act.

The Secretary is granted broad *investigatory* powers, under 29 U.S.C.A. § 521;[5] to delve into union

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[4] The court has searched unsuccessfully for any authoritative source in which the exhaustion doctrine has been disparaged or in which it is suggested that courts may disregard it. Cf. Symposium on the Labor-Management Reporting and Disclosure Act 138, 259, 284, 333–336, 505.

[5] 521. Investigations by Secretary; applicability of other laws

(a) The Secretary shall have power when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this chapter (except subchapter II of this chapter) to make an investigation and in connection therewith he may enter such places and inspect such records and accounts and question such persons as he may deem necessary to enable him to determine the facts relative thereto. The Secretary may report to interested persons or officials concerning the facts required to be shown in any report required by this chapter and concerning the reasons for failure or refusal to file such a report or any other matter which he deems to be appropriate as a result of such an investigation.

(b) For the purpose of any investigation provided for in this chapter, the provisions of sections 49 and 50 of Title 15

election procedure; there is no requirement that the investigation be preceded by a request from a dissatisfied member. In advancing his second objection to the defendant's motion to dismiss, the plaintiff would have us read the permissive scope of inquiry in § 521 into 482 because the public policy which prompted the inclusion of § 521 in the Act would best be served in this manner. He seeks, in effect, legislation by judicial edict.

To support this contention the plaintiff cites *Wirtz* v. *Local 191, International Brotherhood of Teamsters, etc.*, 218 F. Supp. 885 (D.C. Conn. 1963), where the Secretary moved to enforce a subpoena duces tecum which had been served on a union pursuant to an investigation under § 521. The union resisted the subpoena on the ground that, since action by the Secretary to secure judicial remedy against an election is conditioned upon complaint by a member who has exhausted internal remedies, and no such showing had been made, the Government should be denied access to union records which might have importance in a subsequent suit. As the Court phrased the question:

> . . . must it be shown that the conditions precedent to the filing of a complaint by the Secretary have been fulfilled in order to permit an investigation by the Secretary and his use of the subpoena power to implement that investigation? 218 F. Supp. 885, 886.

In overruling the union's objection, the Court recognized the basic differences between the two provisions: § 482 permits *challenge* of an election by re-

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(relating to the attendance of witnesses and the production of books, papers, and documents), are made applicable to the jurisdiction, powers and duties of the Secretary or any officers designated by him.

sort to court, while § 521 permits *investigation* of an election. The right to investigate is unfettered by the restrictions surrounding the right to sue.[6]

On appeal the Second Circuit Court clearly analyzed the two sections in affirming the decision of the lower court. In dismissing the attempt by the union to read the restrictions of § 42 into § 521, the Court had no difficulty in reconciling the two sections because they are directed to two different objectives.

> No conflict is created by reading Section 402 and Section 601 together. Section 402 provides for the Secretary's instituting an action in the courts in behalf of an individual who has complained of a violation of Title IV. Section 601 provides that the Secretary shall "determine the facts relative" to a violation or threatened violation and that he may report the results of his investigation "to interested persons or officials." It may be that some or all of the limitations of Section 402, such as the exhaustion of internal remedies, are relevant to the suit which that section authorizes; there is in Section 601 no similar limitation on the

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[6] The plaintiff relies upon this statement by the Court to support his argument that the interest of the public requires us to ignore the plain wording of the statute:

> But there is far more at stake in protecting democratic election procedures for all members . . . There is nothing ambiguous about the legislative policy in the Labor-Management Reporting and Disclosure Act to advance union democracy . . . Likewise it is clear from legislative history that Congress recognized that since the public interest in safeguarding and improving the electoral process exceeds even that of members, it might be unwise to place too much reliance on its members to vindicate that interest.

Not only is this statement totally unsupported by any reference to the legislative history upon which it purports to be founded, but it is pure dictum and of no avail to the plaintiff in this case.

> Secretary's power to investigate and report. Presumably the Secretary can bring an action only when a complaint has been filed by an individual member (Section 402). But he can investigate and report without such a complaint. The two sections of the statute can thus be read together and each be given full effect in complete harmony and without any trace of clashing purposes. 321 F. 2d 445, 448.

This case, rather than support the plaintiff's position on this issue, proves fatal to his argument; in that case, we find a union espousing a position which is the counterpart of the Secretary's position in the instant case. Just as the Connecticut District Court and the Second Circuit Court refused to grant the union's request to read restrictions into § 521, we refuse to read those same restrictions out of § 482.

In his solicitous pursuit of the public interest, the Secretary cites *Goldberg* v. *Amalgamated Local Union* 355, 202 F. Supp. 844 (E.D. N.Y. 1962) to further the argument that the public interest permits him to allege violations of the Act not contained in the member's internal protest. But that Court explicitly stated that

> [o]nly after the member of the labor organization has exhausted the remedies available to him under the Constitution and by-laws of the labor organization . . . does the right of the Secretary accrue. 202 F. Supp. 844, 846.

Plaintiff here invokes the doctrine of "public interest." Can we place this "public interest" of which the government is here so solicitous above the interest of the individual members of the union? Unions are voluntary associations, organized by workers to promote their common welfare. The sole reason for their existence is to advance the cause of the individual laborer by negotiating from a position of collec-

tive strength to secure favorable wages and working conditions. The individual members entrust this strength to the officers of the union, just as the members of this defendant union did by the election of June 8, 1963. It is highly significant that not one voice of protest has been heard from the membership against the conduct of that election. We do not think that the Secretary under the guise of "public interest" may be permitted to complain when the membership has not; to hold otherwise would, in fact, be inimical to true public interest because it would require legislation by judicial fiat. If the members are satisfied, then the government ought to be satisfied.

The third contention advanced by the plaintiff suggests that the Court may, in its discretion, ignore the requirement of internal exhaustion. We disagree. The cases where this has been done involved situations where the internal complaint was to be heard by those very people against whom complaint was to be made. Cf., eg., *Calagaz* v. *Calhoun,* 309 F. 2d 248 (5th Cir. 1962). This is but a further expression of a basic tenet of American jurisprudence—the law will not require a useless act. It is significant that the cited case and other like it do not involve actions brought by the Secretary under § 482. The Court finds, therefore, that it is without discretion to erase the explicit condition which Congress wrote into the statute.

In addition to these affirmative attacks upon the doctrine of exhaustion of remedies, the plaintiff suggests that the defendant should be estopped from asserting the failure of this condition precedent. Since the union had been directed to investigate a complaint about the July 13 run-off, it is argued, it should then have investigated the election of June 8. We disagree, for the simple reason that no one asked for such an investigation. The purpose of retaining the

exhaustion requirement in the LMRDA is to afford the union the first opportunity to police its own behavior; if no complaint is heard, however, no investigation is launched. The statute (29 U.S.C.A. § 472(a)(2)) permits courts, when suit is brought, to presume that an election is valid until the contrary be proven. Thus the burden of proof and the risk of persuasion must be borne by the party which attacks an election. By analogy the union itself should be entitled to make that same presumption; the union can presume that its procedure is correct and need not investigate unless and until a member complains. Thus we hold that the union was not required to investigate the election of June 8, and the union is not estopped from asserting the failure of a condition precedent to the Secretary's complaint against that election.

APPENDIX C

United States District Court, Northern District of Ohio, Eastern Division

Civil Action No. C 64–99

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

LOCAL UNION NO. 125, INTERNATIONAL HOD CARRIERS' BUILDING AND COMMON LABOBERS' UNION OF AMERICA, DEFENDANT

MEMORANDUM OPINION

BATTISTI, J.

On June 8, 1963, defendant held a general election of officers. In this election the vote for the office of Business Representative resulted in a tie between two of the three candidates, those two being Cecil Dial and Andrew E. Jackson. On July 13, 1963, defendant held a run-off election for the office of Business Representative. In the run-off election Andrew E. Jackson received 198 votes, Cecil Dial received 179 votes, and Irwin Ferry received 2 votes.[1] Subsequent to the July 13 election, Andrew Jackson was sworn in as Business Representative of the defendant.

On August 11, 1963, Cecil Dial, acting pursuant to defendant's constitution, protested the conduct of the run-off election to the General Executive Board of the International Hod Carriers' Building and Common Laborers' Union of America. This protest

[1] Mr. Ferry was the third candidate in the June 8 election.

was denied by the General Executive Board on December 2, 1963. On December 9, 1963, Dial filed a complaint with the Secretary of Labor. Upon receipt of Dial's complaint the Secretary investigated both the June 8, 1963, general election and the July 13, 1963, run-off election.

On February 7, 1964, the Secretary filed the present action under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C.A §§ 401–530 (hereinafter referred to as the Act) seeking an order setting aside the June 8, 1963, general election and also the July 13, 1963, run-off election. In his complaint the Secretary alleged *inter alia* that the defendant had violated Section 401 of the Act (29 U.S.C.A. § 481) in that it had failed to conduct the two elections in accordance with its constitution and bylaws. The Secretary further alleged that these violations may have affected the outcome of the two elections.

In a memorandum opinion dated July 13, 1964, Chief Judge Connell granted the defendant's motion to dismiss that portion of the complaint directed to the general election of June 8, 1963. *Wirtz* v. *Local No. 125, International Hod Carriers' Building and Common Laborers' Union of America,* 231 F. Supp. 590 (1964). In dismissing that portion of the complaint, Judge Connell found that since no member of the defendant had complained internally about the conduct of the June 8 election, the Secretary's allegations with regard to said election were not, as required by Section 402 of the Act (29 U.S.C.A. § 482),[2]

[2] Section 402 of the Act (29 U.S.C.A. § 482) provides in pertinent part as follows: (a) A member of a labor organization—(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or (2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation, may file a complaint with the Secretary

predicated upon a complaint by a union member who had exhausted his internal remedies.

The Secretary has now moved for summary judgment with regard to that portion of his complaint directed to the run-off election of July 13. In the alternative, the Secretary moves that the action be advanced on the trial docket.

As has already been noted, the Secretary alleges that defendant, in violation of Section 401(e) of the Act (29 U.S.C.A. § 481(e)), failed to conduct the July 13 election in accordance with the applicable provisions of its constitution and bylaws. Specifically, the Secretary alleges that the defendant (1) permitted ineligible candidates to run for office, and (2) permitted persons to vote who were ineligible to do so.

Section 401(e) of the Act (29 U.S.C.A. § 481(e)) provides in pertinent part as follows:

> (e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of

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within one calendar month thereafter alleging the violation of any provision of Section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). * * * (b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization. * * *

> any kind by such organization or any member thereof. * * * Each member in good standing shall be entitled to one vote. * * * The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title.

It is clear, and the defendant does not urge otherwise, that the run-off election of July 13 comes within the purview of Section 401(e) of the Act. The alleged violations of Section 401(e) will be considered separately below.

ALLOWING INELIGIBLE PERSONS TO VOTE IN THE JULY 13 ELECTION [3]

Article VIII of Local 125's constitution provides in pertinent part as follows:

> Section 5. The monthly dues are due on the first day of the month and unless paid on or before the last day of the following month, the member *shall be considered to be in arrears and suspended without notice.* [Emphasis supplied.]
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> * * * * *
>
> Section 7. The readmission fee for persons who are suspended for nonpayment of dues, assessments or fines to the Local Union and who remain suspended for a period of less than one year, shall be the amount of such assessments or fines in addition to the following: * * *[figures omitted] * * * Once the member has defaulted in the payment of dues, as herein provided, the date of suspension referred to in this

[3] It is clear that the portion of the Secretary's complaint directed to the matter of the eligibility of voters in the July 13 election is, as required by Section 402 of the Act (29 U.S.C.A. § 482), predicated upon a complaint by a member of the defendant who has exhausted his internal remedies.

> section, shall be the first day after the month for which the member's dues were last paid.
>
> Section 8. *Persons in arrears have no right to attend meetings nor any other rights except the right to be readmitted in accordance with the above section* [Section 7]. If a member becomes suspended by reason of his own conduct he can only be readmitted through the Local Union of which he was a member when suspended. Readmitted members shall be considered new members from the date of their readmission. [Emphasis supplied.]

It is on the basis of the above-quoted portions of Article VIII of the defendant's constitution that the Secretary predicates his claim that certain ineligible persons voted in the July 13 election. The Secretary urges that under the clear and unambiguous language of Article VIII a member who has not paid his dues within the time provided by Section 5 is automatically in arrears and should be suspended without notice. The Secretary further urges that once a member has fallen in arrears, he loses all rights except the right to be readmitted, in accordance with Section 8 of defendant's constitution and, therefore, is not entitled to vote in union elections unless and until he has paid the madatory readmission fee.

Article XVIII, § 3, of the International Constitution provides as follows:

> Section 3. Each Local Union shall, through its Secretary-Treasurer, pay to the International Union a per capita tax of $1.00 per member per month, payable for the current month on each member in the Local Union and an initiation fee of $5.00 for each member registered with the International Union as a member and $2.50 for each member readmitted; each initiation fee and each readmission fee must be accompanied with the per capita tax for the month in which the member is registered or readmitted.

It is clear from the defendant's answers to the plaintiff's interrogatories that defendant maintains "per capita tax sheets" reflecting payments made to the International pursuant to Article XVIII, § 3, of the International Constitution.

At the July 13 election, members listed as paid for the month of May 1963 on the Secretary-Treasurer's per capita tax sheets were deemed to be in good standing and, thus, eligible to vote. (Admission 19.) These per capita tax sheets did not, however, accurately reflect the names of those persons who were actually in good standing as of July 13. (Admission 11.) Said sheets were inaccurate because the Secretary-Treasurer of the defendant had paid the per capita tax for certain persons who were delinquent in the payment of their May 1963 dues and also for certain persons who had either not paid or had not completed payment of mandatory readmission fees. Thus, of the 379 persons voting in the July 13 election, 58 were delinquent in their payments to the union. (See responses to plaintiff's request for admissions Nos. 20 and 21.)[4]

Mr. Martin M. Mason, Secretary-Treasurer of the defendant, has, by way of affidavit, stated, as follows:

> The plaintiff also urges that many members for whom I paid their per capita tax were not eligible to vote. In the fall of 1962 and spring of 1963, there was a lot of unemployment in the Youngstown area. A lot of men who had been long-time members could not find work. They wanted to remain members and be eligible for any work that came along. They asked me for consideration as in the past to pay their per capita tax and keep their membership alive.

[4] As to 13 of the 58, the facts giving rise to an obligation to pay a readmission fee are not readily apparent. See Admissions 21 (d), (e), (k), (l), (u), (w), (z), (ak), (as), (ax), (ay), (az), (bg).

> This was not a practice I set up but was procedure that had been long established prior to my coming into office. I did this to help and assist these old time members. I explained this fully in my statement, plaintiff's exhibit "I". I think I should have an opportunity to explain this to the Court by testimony and not have this motion decided on these papers. (Defendant's exhibit 1.)

It might be noted that in plaintiff's exhibit I, the statement referred to in the above-quoted portion of Mr. Mason's affidavit, Mr. Mason stated in part as follows:

> I as Secretary-Treasurer of Local 125 have, on my own initiative, paid per capita tax to the International for members who have not paid dues to the Local. Many of these persons should have been automatically suspended. I am also aware that these persons, delinquent over 61 days, should have been required to pay reinstatement fees to Local 125. According to our constitution, these members I have carried by paying their per capita tax who have not paid a reinstatement fee are not members in good standing and they should not have been permitted to vote in Local 125's election. The reason I carried some of these members by paying per capita tax to the International was so that they would work. Unemployment has been in Youngstown, Ohio, and members don't have the money for dues. I paid their per capita out of the General Funds of the Local. However, many persons have been suspended by me for failure to pay dues. I only paid per capita for members I knew had been unemployed, had been long time members and I took into consideration personal hardships and family situations. I have kept no records of persons that I paid per capita for or who had not paid reinstatement fees.

Prior to the July 13 election it had been called to the attention of the International that the Secretary-Treasurers of certain locals were forwarding per-capita tax payments to the International for certain persons who were delinquent in payments to the local. On February 7, 1963, in a letter addressed to all affiliated local unions, district councils, and members, the General President and the Secretary-Treasurer of the International made the following comments with regard to this practice:

> The General Executive Board, at a recent meeting, was made aware of several complaints and protests regarding payments of constitutional fees, such as dues, initiation fees, readmission fees, et al.
>
> At the outset, it is to be observed that corresponding payments made by Local Unions to the General Secretary-Treasurer of the International Union, such as per capita tax, etc., are received and accepted on the presumption of propriety; namely, that the payments submitted are pursuant to and in accordance with the full intent of constitutional requirements. To illustrate: when the Secretary-Treasurer of a Local Union forwards per capita tax in behalf of a member, the presumption is that the Secretary-Treasurer has received payment of the dues for the particular month, directly from the member. It now appears that, in some instances, Secretaries-Treasurers of Local Unions forward per capita tax to the International Union for certain members who have not paid dues for the corresponding month.
>
> The information further discloses that, in some instances, there has been a practice of so-called "free dues". This has occurred and has been applied to various officers of Local Unions, stewards on jobs, sick members, and for individuals in other categories or capacities.
>
> It must be noted that such offer of per capita tax is definitely improper because it is not based

on a payment made directly by the member to the Local Union and, accordingly, any submission of per capita tax by the Secretary-Treasurer is therefore void, invalid and of no effect. You will also notice that, this being so, the member is not in good standing under the provisions of the Constitution.

In order that this entire area of mistaken and improper activity may be corrected, the General Executive Board, at its meeting held January 9–29, 1963, voted, that in all instances where and when the General Secretary-Treasurer, on and after April 1, 1963, finds that per capita tax and other fees submitted by Local Unions, are not based upon corresponding payments directly made by the member to the Local Union, such submission shall be deemed to be invalid, improper and of no effect.

It must be noted, as stated above, that where and when such finding occurs, the result is, that the members affected are not in good standing if the delinquency is for a period longer than that specified and provided for in the Constitution.

All affiliates and members please take note and abide yourselves accordingly. (Plaintiff's exhibit C)

* * * * *

It is manifestly clear that the Secretary-Treasurer of the defendant failed to comply with International Union's directive of February 7, 1963. In fact, he acted directly contrary to the instructions contained therein. It is further clear that by using the Secretary-Treasurer's per-capita tax reports to determine voter eligibility for the July 13 election, 58 persons were permitted to vote notwithstanding the fact that they were delinquent in their payments to the defendant. (Admission 20, 21.)

Were the 58 persons who were delinquent in their payments to the defendant union eligible to vote in

the July 13 election? In answering this question, we must look to the constitution of the defendant union. In 87 Corpus Juris Secundum, *Trade Unions*, § 13, p. 776, the following observations are made relative to the construction of union constitutions:

> Trade union constitutions should be read in their living context. The interpretation or construction of the constitution and laws of a union is for the union, through its appropriate board or officers; and the courts will accept such interpretation, as long as there is no claim of fraud, and as long as the officer or body on which this power of interpretation has been conferred does not substitute legislation or amendment for construction, does not transgress the bounds of reason, common sense, or fairness, or act arbitrarily, or contravene public policy or the law of the land, or destroy the property or contractual rights of, the members. Where the language of a rule is clear, no official may nullify it under the guise of interpretation.

As has already been noted, the Secretary urges that under the clear and unambiguous language of the defendant's constitution the 58 persons referred to above were ineligible to vote in the July 13 election.

Article VIII, § 5, of defendant's constitution clearly and explicitly provides that where a member fails to make a timely payment of dues he "shall be considered in arrears and suspended without notice." In answering plaintiff's interrogatories, defendant has indicated that a substantial number of its members have at one time or another been automatically suspended, pursuant to Article VIII, § 5, for nonpayment of dues. Further, the International's directive of February 7, 1963, (quoted on page 8, supra) clearly indicates that a Local is obligated to

suspend a member who fails to make a timely payment of his dues.[5]

The Court finds that under the clear and unambiguous language of Article VIII, § 5, members who fail to make a timely payment of their dues are automatically in arrears and should be suspended without notice.

Under the clear and unambiguous language of Article VIII, § 5, a member who has fallen in arrears has "no rights except the right to be readmitted in accordance with Article VIII, § 7." To be readmitted "in accordance with" Article VIII clearly requires that the member pay the established readmission fee. Thus, the Court finds that under defendant's constitution once a member has fallen in arrears and has thereby lost his rights, he may only regain the same by paying the established readmission fee. Moreover, there is no provision in the defendant's constitution which gives the Secretary-Treasurer of the Local the right to waive the required readmission fee.

As has previously been noted, 58 of the persons who voted in the July 13 election were either delinquent in the payment of their May, 1963 dues or had not paid or completed payment of mandatory readmission fees. The Court finds that these persons

[5] Between May 1, 1962, and January 1, 1963, 357 members were so suspended; between January 1, 1963, and May 1, 1963, 229 were so suspended; between May 1, 1963, and June 8, 1963, 22 were so suspended; between June 8, 1963, and July 13, 1963, 73 were so suspended. (Defendant's answers to plaintiff's interrogatory No. 8.) The substantiality of these figures is readily apparent when viewed in relation to total membership figures. Defendant has indicated that it had 967 members on May 1, 1962, 730 on May 1, 1963, 717 on June 8, 1963, and 729 on July 13, 1963. (Defendant's answers to plaintiff's interrogatory No. 7.)

were not, under any reasonable construction of defendant's constitution, members in good standing and therefore, were ineligible to vote in said election.

Defendant has urged that plaintiff's motion for summary judgment should be denied for the reason that there is an unresolved question of fact as to whether the practices followed by the defendant were reasonable. Defendant's position seems to be that even if it did not follow the eligibility standards of its constitution and bylaws, it must nonetheless be determined whether the standards actually followed were reasonable. This position lacks merit, for it seems clear that one of the basic purposes behind the election provisions of the Act was to require unions to comply with the provisions of their constitution and bylaws in the conduct of their elections. Where, as here, the conduct complained of cannot be justified under any reasonable construction of the union's constitution or bylaws, it would be most anomalous to hold that the conduct did not violate the Act because it was, in some abstract sense, "reasonable." [6]

On January 27, 1966, the Court heard oral arguments on the plaintiff's motion for summary judgment. On that date counsel for the defendant presented to the Court a copy of a directive of the International Union dated January 17, 1966, and ad-

[6] It is clear from Mr. Mason's affidavit that special consideration was given to only those delinquent members who Mr. Mason felt were deserving; and, further, that in granting such special consideration Mr. Mason was not acting pursuant to any authority granted to him by the defendant's constitution or bylaws. Further, Mr. Mason did not maintain records pertaining to his actions. If the Court was required to view the conduct complained of herein in the abstract, it would be forced to conclude, on the basis of the affidavits, admission and answers to plaintiff's interrogatories, that said conduct was, as a matter of law, unreasonable.

dressed to all local unions, district councils and members. The directive reads as follows:

RE: Right to Vote

Dear Sirs and Brothers:

The General Executive Board, at its November 29–December 10, 1965 meeting was made aware of a grave danger to our membership, which has developed as a result of a *misterpretation* of the Uniform Local Union Constitution and Release #1 of 1963, and which is threatening to deprive many members of long standing of their rights and benefits under the Union's Constitution and collective bargaining agreements, particularly the right, otherwise available, under the Union's Constitution to vote in the Union's general election for the candidate of their choice.

The General Executive Board was presented with the issue of whether or not members in good standing *on the day of election* must be deprived of their right to *vote on election day* because at one time or another during the course of their membership, dues which they offered late were accepted by the Local Union, and the Local Union remitted per capita tax within the Constitutional period to the International Union, as a result of which the member's good standing was not, in fact, interrupted.

The General Executive Board, for years, knew of a long-standing practice in many Local Unions where per capita tax payments were being improperly forwarded to the International Union by Local Unions. Release #1 of 1963 was directed principally toward advising Secretary-Treasurers of Local Unions on the proper conduct of their office, the payment of dues and the persons on whose behalf per capita tax should be forwarded to the International Union.

However, nothing contained in Release #1 nor in the Union's Constitution, stated in terms or inferred, that such a member whose good standing was not interrupted should be deprived of his legal and Constitutional right, otherwise available, to vote when he approached the polling place on election day. Nor was this, in fact, the intent of the General Executive Board in issuing Release #1, nor of the drafters of the Uniform Local Union Constitution.

Indeed, to the contrary, the Board had consistently maintained the position throughout the years, that its Constitution must be interpreted as a *living document* in the light of the Union's history and tradition—giving due regard to its unique and real needs—not from a formalistic standpoint. It was never the intention of the Union in adopting its Constitution, or of the General Executive Board in issuing Release #1 or in otherwise interpreting its Constitution to *deprive members* of their right to vote. The Board had always interpreted its Constitution liberally to preserve the right of members to vote. Particularly, in dealing with problems in the election area, the Board had always placed substantial requirements over form. The Board will continue to adhere to this view.

The Board was troubled by the misinterpretation of the Constitution and Release #1, which threatens to deprive wholesale numbers of members of their right to vote under the Union's Constitution and the Act. First, it felt that such an interpretation was unduly infringing upon the prerogative of the Board to interpert its Constitution in a fair and responsible manner in the interest of the membership, and was seeking to substitute the judgment of persons outside the Union on the meaning of the Union's Constitution for that of the Union's governing body, which had been elected by the

membership and charged with that responsibility.

But, in the Board's view, the principal vice of this hypertechnical interpretation was that it completely ignored the unique, real problems confronting the Union and its membership.

The Board in interpreting its Constitution, is charged with the responsibility of giving due regard to the unique problems confronting the membership.

In issuing Release #1, it was attempting to instruct its Locals on solid financial practices to promote their long run interests. The Board adheres to that view and is in no way attempting to relieve Secretary-Treasurers from their obligations. The Board knew then and it knows now that if its Constitution was construed to disenfranchise such members, a very substantial percentage of the total membership would be deprived of their right to vote. It knew then and it knows now that if such a harsh interpretation was placed upon the Union's Constitution, it would result in depriving many tens of thousands of their members and their families of death benefits built up over the years and of pension rights under collective bargained pension plans throughout this country. Moreover, it knows that if the Union were to adopt the interpretation urged, it would only suspend those members which would simply mean that they would lose their benefits, accruing over the years and be required to pay a new initiation fee under the Union's Constitution as a new member. The Board flatly rejected the opportunity for the International Union collecting such a financial windfall and it instructed the Executive Officers to advise each affiliate of the following action and take whatever possible actions are necessary to defend the right of the membership to act in that regard.

After due consideration, the Board

"VOTED: In accordance with the power and authority vested in it by the International Union Constitution, Uniform Local Union Constitution, and Uniform District Council Constitution, that its Constitutional provisions shall not be interpreted to deprive members of their legal and constitutional right to vote in those instances where local unions have accepted dues late and remitted per capita tax within the Constitutional period to this International Union, so that the local unions were never notified by the International Union that such members were suspended. To the extent that anything contained in Release #1 of 1963 can be construed to reach a contrary conclusion or to cast doubt upon this position, it is hereby modified to that extent nunc pro tunc."

All affiliates and members please take note and abide yourselves accordingly.

Respectfully and fraternally yours,

(S) Jos. V. Moreschi.
(S) Peter Fosco.

Presented to the Court, along with the above-quoted directive, was an affidavit of Robert J. Connerton, General Counsel of the International. In his affidavit Mr. Connerton states that the directive of January 17 is "a formal constitutional interpretation by the General Executive Board binding on all Local Unions and officers."

While the directive of January 17 may reflect an official action taken by the General Executive Board, the directions contained therein are ambiguous, inconsistent with the clear and unambiguous language of the Uniform Local Union Constitution, and, further, are in many respects inconsistent with the instructions given in the directive of February 7, 1963. As has previously been noted, the defendant clearly

acted in violation of its constitution in allowing certain delinquent persons to vote in the July 13 election. The Court finds that the directive of January 17 does not, and cannot, exculpate the defendant from the consequences of its previously improper conduct.[7]

Defendant urges that, even if it is found that the defendant violated its constitution in the conduct of the July 13 election, plaintiff's motion for summary judgment must nonetheless be overruled for the reason that there is an unresolved question of fact as to whether the improper conduct "may have affected the outcome of the election" within the meaning of Section 402(c)(2) of the Act. Defendant states that even if certain ineligible voters voted in the July 13 election it is not clear which candidate they voted for. Defendant's position seems to be that where ineligible votes have been cast it must be shown not only that it is mathematically possible that the outcome of the election was affected, but, also, that the manner in which the ineligible voters voted actually did affect the outcome of the election. Defendant evidently has failed to recognize, however, that Section 401(d) of the Act required that the election in question be held by secret ballot. To require or allow inquiry into the manner in which certain persons have voted would be entirely inconsistent with the Act's requirement that the ballot be secret. The Court, therefore, finds that the Act's secret ballot requirement forecloses any inquiry into how particular persons voted. The Court further finds that if the number of ineligible votes cast is sufficient to make it mathematically pos-

[7] The Court is in no manner indicating what steps the International or the Local can now reasonably take to resolve any problems which might result from such previous misconduct. Further, the Court should point out that this opinion is limited strictly to a determination of whether certain persons had a *right to vote* in the July 13 election.

sible that the outcome of the election was affected, this fact alone conclusively establishes the Act's requirement that the conduct complained of may have affected the outcome of the election.

As has previously been noted, the July 13 election was decided by 19 votes. In said election, 58 ineligible votes were cast. In light of what has been stated above, it is clear that the casting of these votes may have affected the outcome of the election.[8]

The Court finds that, with regard to the portion of the complaint here under consideration, there remains no genuine issue as to any material fact. The Court further finds that the defendant, in the conduct of the July 13 election, violated Section 401(e) of the Act, and that such violation may have affected the outcome of said election. Plaintiff's motion for summary judgment will, therefore, be granted.

ELIGIBILITY OF CANDIDATES

Defendant's constitution requires candidates for office to have maintained continuous good standing in the International for a period of two years and continuous good standing in the Local for a period of one year (Article V, § 1). Prior to the June 8 election, the defendant's Election Committee considered the matter of the eligibility of candidates. In determining eligibilty, the Committee referred to the Secretary-Treasurer's per-capita tax reports and the membership book of each potential candidate. (Admission 12). As has previously been noted, the per-

[8] As has previously been noted, the 58 voters involved either (1) had not paid their May, 1963 dues as of July 13, 1963, or (2) had not paid or completed payment of mandatory readmission fees. The number of persons within either category would, standing alone, have been sufficient to have affected the outcome of the election.

capita tax reports did not give an accurate indication of whether individual members were in good standing at the date of the nominations or election, and, further, did not accurately indicate whether members had been in good standing in the defendant union for the year preceding the election or in the International for two years preceding the election. (Admission 11). The Election Committee did not examine the individual members' ledger cards, which cards would have accurately reflected the members dues payments.

Within one year prior to the nominations and election, Andrew Jackson, the winner of the July 13 election, had been in arrears in his dues payments for more than two months. (Admission 18.) As has previously been noted, once a member falls in arrears he automatically loses his good standing. To regain good standing he must, under Article VIII of defendant's constitution, remit to the union the established readmission fee.

Under the circumstances set out above, it is clear that Mr. Jackson had not been in continuous good standing in the International for two years and, further, had not been in continuous good standing in the Local for at least one year. A similar situation prevailed with regard to Mr. Ferry. (Admission 16.) It is clear, however, that Mr. Dial had been in continuous good standing in the International for two years and, further, had been in continuous good standing in the Local for at least one year.

In protesting the conduct of the July 13 election, Mr. Dial made no claim relative to the eligibility of candidates. It would appear, therefore, that there is a substantial question as to whether, under the reasoning of Judge Connell's opinion, the Secretary is precluded from attacking the election of July 13 on this

basis. Since, however, the Court has already found that the July 13 election must be set aside on the basis of the ineligibility of certain voters, neither this question nor the question of whether the election should be set aside on the basis of the ineligibility of candidates (assuming that the Secretary is not precluded from attacking the election on this basis) need be resolved.

An order will be entered in accordance with this memorandum opinion. Since the July 13, 1963, election concerned a single office, and, further, since the defendant will obviously be holding a general election within several months, it is clear that many practical problems are presented with regard to the provisions to be contained in said order. The Court, therefore, requests that counsel meet within ten days and attempt to agree upon a final order which takes into account the practical problems involved. If the parties are able to agree upon an order, said order should be submitted to the Court on or before April 15, 1966. If the parties are unable to agree upon an order, the parties should inform the Court to this effect on or before the same date.

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